

nature of the program. Thus, in most instances, a captioned version of the live performance is available shortly and aired as a repeat performance after the actual event.

C. The Commission Should Clarify Its Rules Governing Exemptions For Foreign Language Programming

At Paragraph 72 of its *Notice*, the Commission seeks comment on whether its general exemption should cover foreign language programming. While HBO will leave it to others to comment on the feasibility of captioning, for example, the programming that airs on channels which serve primarily as Spanish language channels, the issue of foreign language programming raises several questions of particular interest to HBO that the Commission should address in adopting its rules.

First, the Commission should clarify that any captioning requirement it adopts for foreign language programming should not extend to services which offer a second language soundtrack. HBO en Español, for example, is an enhancement which offers HBO viewers the option of a Spanish language soundtrack, but the programming remains closed captioned in English. To require Spanish closed captioning for this service enhancement, while perhaps technically feasible, would effectively double the cost of captioning such programming. This increased cost simply could not be justified based on the limited audience for such programming -- a hearing impaired Spanish speaking, non-English reading, subset of a Spanish speaking subset of HBO subscribers. To require such captioning of the second language audio track would raise the

cost of the entire enterprise without demonstrable benefit, and would serve as a disincentive for programmers to provide second language soundtracks as a special service.

Second, should the Commission adopt rules which require the captioning of foreign language programming, it should clarify that the captioning requirement does not extend to foreign language programming that already contains English subtitles, or to discrete portions of programs which, for whatever reason, may contain foreign dialogue. For example, it would be unreasonable to require that a portion of an English language World War II movie which depicts Japanese soldiers conversing in Japanese contain captions which translate the soldiers' conversation into English or to display Japanese captions. In this example, the director of the film has chosen to make this dialogue unintelligible to the primary English-speaking audience. Thus, no captions over this dialogue, or a caption which simply reads "[Soldiers speaking in Japanese]" would suffice to depict for the hearing impaired a conversation unintelligible to all but Japanese-speaking viewers and preserve the filmmaker's artistic intent.

**D. The Commission's Rules Should Include
A Procedural Mechanism Through Which
Individual Service Providers Or Owners Of
Programming May Seek An Exemption From
The Closed Captioning Requirements**

HBO concurs that the Commission should adopt rules which permit programming providers or owners to petition the Commission for an exemption from the captioning rules based on a showing that mandatory captioning would result in an "undue

burden" on the provider or owner. Such a procedure is necessary and consistent with Congressional intent. As discussed *supra*, much of the administrative burden created by adoption of a procedure which permits waivers on a case-by-case basis would be alleviated by the adoption of an 80% maximum for closed captioning of new programming. Moreover, exemptions for general categories of programming such as interstitials and live music programming will reduce significantly the number of circumstances for which programmers would be compelled to file waiver requests.

There will, however, remain individual circumstances where the need for closed captioning programming must be weighed against the possibility of inhibiting the production and distribution of programming. The Commission's rules should provide a procedural mechanism to account for these situations. HBO believes that the four factors delineated by the Commission for evaluating particular petitions for exemptions are valid. HBO suggests, however, that the Commission's analysis should extend beyond the financial resources of the program provider, distributor or owner. In certain circumstances, while resources for closed captioning might be available, the expenditure of those resources might not be justified under a cost/benefit analysis.

Finally, the Commission's rules should allow any party in the distribution chain -- e.g., producer, owner, provider -- to petition for such a waiver. Once a waiver for a particular

program or programs has been granted, it should apply equally to all parties in the distribution chain.

E. Existing Contracts

Consistent with the statutory mandate that existing contracts that are "inconsistent with" captioning be exempted, HBO submits that all contracts in effect prior to the effective date of the 1996 Act which do not grant captioning rights to the licensees, be exempt. HBO is aware of no licensing agreements that specifically prohibit closed captioning. However, the agreements typically reserve for the licensor all rights not specifically granted in the contract. If licensees were compelled to caption programming for which they lacked the contractual captioning right, they would run the risk of violating copyrights should they create and insert captions without permission.

Under these circumstances, if licensees were forced to secure permission to caption, the result would be to alter the economic basis of the existing contracts. Licensees could be forced to pay for captioning rights and to absorb the costs of captioning, something not contemplated by their licensing agreement or reflected in the licensing fee. For these reasons, HBO submits that existing contracts that have not already allocated the captioning right to licensees should be exempted from the rules.

**VI. THE COMMISSION SHOULD REFRAIN FROM IMPOSING
NON-TECHNICAL STANDARDS FOR QUALITY AND ACCURACY**

The adoption of regulations governing non-technical standards for quality and accuracy of closed captions is unwarranted. In the same way consumers do not tolerate poor audio or video quality, they will not tolerate closed captioning that fails to meet acceptable standards. As has happened time and again with other enhancements to programming services, the marketplace will solve issues of quality standards much more quickly and efficiently than government regulation. Further, there currently exist adequate professional certifications for individuals entering the closed captioning industry, as well as exhaustive guidelines developed by the Department of Education for evaluation and quality control assessment, thus vitiating the need for onerous regulation.

Moreover, it seems inadvisable, if not jurisdictionally questionable, for the Commission to involve itself in the oversight of grammar and spelling. This type of regulation of quality could well hinder the development and expansion of closed captioning, and could interfere with the producer's or other captioners' art. A producer, for example, may wish to alter the quality of his audio or video for creative reasons. He or she should be given the same discretion as to captioning.

In sum, as the Commission recognizes, there exists a marketplace incentive for program providers and producers to distribute the best quality captioning possible, and to

increase the quality of captioning within the allowable cost constraints. The Commission should forbear from adopting further regulation, and allow these marketplace forces to work.

VII. ENFORCEMENT AND COMPLIANCE REVIEW

HBO concurs that any closed captioning requirements ultimately adopted by the Commission will best be enforced through the existing types of complaint processes. In order to facilitate the enforcement process, HBO submits that video programming providers, such as broadcast stations or cable systems, annually place in their public files information regarding the amount of closed captioned programming they distribute. Thus, persons wishing to file a complaint would be able to obtain necessary information at the local level.

As in the other contexts, for example, where networks send certifications to their affiliates demonstrating the network's compliance with the children's television advertising rules, networks could provide annual certifications to their affiliates, as of the end of each calendar year, that the networks have provided captioning for a specific percentage of their programming. In this manner, programmers and program distributors would be able to assess accurately whether they are in compliance with the Commission's captioning guidelines without an unnecessary expenditure of resources.

VIII. CONCLUSION

In order to balance the benefits of closed captioning to the hearing impaired community and the benefits of offering increasingly diverse programming to all viewers, the Commission should craft its rules governing closed captioning to afford program owners, producers and distributors sufficient flexibility to do what they do best -- respond to the demands of the American public. With this goal in mind, and for the reasons set forth above, HBO recommends that the Commission should modify its proposed rules as specified herein.

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